Malayan Banking Bhd v Sykt Jaya Perkakas (Sabah) Sdn Bhd & Ors

HIGH COURT (TAWAU) — CIVIL SUIT NO T398 OF 1986
IAN HC CHIN JC
22 JULY 1993

Civil Procedure *— Judgment — Leave to enter judgment — Action for money lent — Whether action was a charge action within O 83 of the Rules of the High Court 1980 — Whether leave required to enter judgment — Rules of the High Court 1980 O 83*

Banking *— Security for advances — Deed of assignment — Equitable charge — Action for money lent — No leave required to enter judgment — Rules of the High Court 1980 O 83*

Civil Procedure *— Notice of demand — Judgment sum less than sum demanded in notice — Whether notice was proper*

Banking *— Security for advances — Loan agreement and deed of assignment — Loan released before down payment made — Whether breach of contract — Whether the first defendant could rely on its own failure to pay the down payment as a defence*

Contract *— Guarantee — Breach of contract — Conditions of guarantee — Loan released before down payment made — Guarantors were not discharged from their liability under the guarantee*

Civil Procedure *— Judgment — Setting aside — Judgment in default of appearance — Unexplained delay of more than five years — Bona fides — Principles applicable*

By a writ issued on 25 November 1986, the plaintiffs sued the first defendant on a loan of RM230,000 granted to the first defendant, while the other defendants were sued on a guarantee in respect of the loan. The writ was served on the defendants and judgment in default of appearance was entered on 17 March 1988. On 10 April 1993, after a lapse of more than five years, the first, second, third and fifth defendants applied to set aside the judgment on the grounds that: (a) insofar as the first defendant was concerned, the action was a charge action within O 83 of the Rules of the High Court 1980 ('the RHC') and the judgment was irregular because leave of court was not obtained; and (b) as for all the defendants: (i) there was no proper demand for payment; and (ii) there was a breach of the loan agreement, in that the plaintiff released the loan before the down payment for the property was made by the first defendant.

Held, dismissing the application:

(1) In the present case, although the plaintiff held an equitable charge by way of the loan agreement and deed of assignment, and could have combined their claim for the recovery of the loan with a claim for the possession of the property, which would have come

under O 83 of the RHC, they did not, and chose only to sue for the recovery of the money. It was a simple claim on money lent, for which no leave was required for judgment to be entered.

(2) The second, third and fifth defendants did not aver that they had not received the notice of demand, nor was it their case that the partial payments made after the notice had affected the notice of demand. They only complained that the notice of demand was not a proper notice because the judgment sum was less than that demanded. No authority was cited for this proposition and therefore, there was no merit in the proposed defence.

(3) The complaint that the loan was released before the down payment was raised for the first time in the affidavit of 7 April 1993. In fact, when pressed for payment, the first defendant responded by making part repayment of the loan. Furthermore, there was no allegation that the plaintiff had, in contravention of any instruction of the first defendant, released the loan to the detriment of the first defendant. Therefore, the first defendant could not set up its own failure to fully pay the down payment for the property as a defence to the plaintiff's claim. As for the other defendants, there was no allegation that it was a condition of the guarantee that the plaintiffs would not release the loan until the down payment had been fully paid.

(4) Where a judgment was an irregular judgment, a defendant is entitled ex debito justitiae to have it set aside. In the case of a regular judgment, although unexplained delay is a relevant consideration, the predominant consideration is still whether there is a defence on the merits. However, unexplained delay may justify the court's conclusion that the application to set aside the judgment was not made bona fide. Here, there was no explanation at all why the defendants took more than five years to apply to set aside the judgment. This fact, coupled with the manner in which the affidavits had been deposed by the defendants, cast doubts on the bona fides of the application of the defendants.

Obiter:

(1) In cases of this nature, where the plaintiff could, in one proceedings, obtain the relief of foreclosure or possession and the recovery of the money and yet chose only to sue for the recovery of the money and not both, the plaintiff may, if subsequent action is commenced for foreclosure or possession, be barred on the ground that it is an abuse of the process of the court to divide the remedy where there is a complete remedy in the first action.

(2) Order 83 of the RHC has no relevance to a legal, as distinct from an equitable, charge because legal charges, that is charges constituted by properly registered memoranda of charge, are governed by the provisions of the Land Ordinance of Sabah and the rules made thereunder.

A **[Bahasa Malaysia summary**

Melalui suatu writ yang dikeluarkan pada 25 November 1986, plaintif telah mendakwa defendan pertama atas suatu pinjaman berjumlah sebanyak RM230,000 yang telah diberikan kepada defendan pertama, sementara defendan lain didakwa atas jaminan berkenaan dengan B pinjaman itu. Writ telah disampaikan kepada defendan dan penghakiman ingkar kehadiran telah dimasukkan pada 17 Mac 1988. Pada 10 April 1993, iaitu selepas lebih daripada lima tahun, defendan pertama, kedua, ketiga dan kelima telah memohon untuk mengetepikan penghakiman itu atas alasan bahawa: (a) sejauh mana yang defendan pertama terlibat, tindakan itu adalah suatu tindakan gadaian di bawah C A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah itu') dan adalah luar aturan kerana kebenaran mahkamah tidak diperolehi; dan (b) berkenaan dengan semua defendan: (i) tidak terdapat tuntutan yang sempurna untuk pembayaran balik; dan (ii) terdapat mungkir perjanjian pinjaman, iaitu plaintif telah memberi pinjaman itu sebelum D bayaran pendahuluan untuk hartanah itu telah dibuat oleh defendan pertama.

Diputuskan, menolak permohonan itu:

(1) Dalam kes ini, walaupun plaintif memegang gadaian ekuiti melalui suatu perjanjian pinjaman dan suratikatan penyerahhakan, dan E boleh menggabungkan tuntutan mereka untuk mendapat kembali pinjaman itu dengan tuntutan untuk milikan hartanah itu, yang termasuk di bawah A 83 Kaedah itu, mereka tidak berbuat demikian tetapi memilih hanya untuk mendakwa bagi mendapat kembali wang itu. Ini adalah tuntutan biasa untuk wang yang F dipinjamkan, yang mana kebenaran mahkamah tidak diperlukan untuk penghakiman dicatatkan.

(2) Defendan kedua, ketiga dan kelima tidak mengatakan bahawa mereka tidak menerima notis tuntutan, dan bukan kes mereka bahawa bayaran sebahagian tuntutan itu selepas notis disampaikan telah menjejaskan notis tuntutan itu. Mereka hanya mengadu G bahawa notis tuntutan itu bukan notis yang wajar kerana jumlah penghakiman adalah kurang daripada jumlah yang dituntut. Tidak ada autoriti yang disebutkan untuk saranan ini, dan oleh itu, tidak ada merit dalam pembelaan ini.

(3) Aduan bahawa pinjaman itu telah dilepaskan sebelum bayaran H pendahuluan telah dikemukakan untuk kali yang pertama di dalam afidavit yang bertarikh 7 April 1993. Sebenarnya, apabila diminta membayar, defendan pertama telah membayar sebahagian daripada pinjaman itu. Lagipun, tidak ada penegasan bahawa plaintif telah melanggar sebarang arahan defendan pertama dalam melepaskan pinjaman itu demi memudaratkan defendan pertama. Oleh itu, I defendan pertama tidak boleh menggunakan kegagalannya sendiri untuk membayar sepenuhnya bayaran pendahuluan itu sebagai suatu pembelaan kepada tuntutan plaintif. Mengenai defendan

lain, tidak ada penegasan bahawa adalah suatu syarat jaminan yang plaintif tidak akan melepaskan pinjaman itu sehingga bayaran pendahuluan telah dibayar sepenuhnya.

(4) Di mana suatu penghakiman merupakan penghakiman luar aturan, defendan berhak ex debito justitiae untuk mengetepikannya. Dalam kes penghakiman mengikut aturan, walaupun kelengahan yang tidak dijelaskan merupakan suatu pertimbangan relevan, pertimbangan utama masih adalah sama ada terdapat pembelaan atas meritnya. Bagaimanapun, kelengahan yang tidak dijelaskan mungkin menjustifikasikan keputusan mahkamah bahawa permohonan untuk mengetepikan penghakiman itu tidak dibuat secara bona fide. Di sini, tiada penjelasan langsung mengapa defendan mengambil lebih daripada lima tahun untuk memohon mengetepikan penghakiman itu. Fakta ini, bersama dengan cara afidavit telah dideposkan oleh defendan, menimbulkan keraguan tentang bona fides permohonan defendan itu.

Obiter:

(1) Dalam kes yang bersifat sedemikian, di mana plaintif boleh, dalam suatu prosiding, mendapat relief sekat-tebusan atau mendapat kembali milikan dan mendapat kembali wang, tetapi hanya memilih untuk mendakwa bagi mendapatkan kembali wang itu dan bukan kedua-duanya, plaintif boleh, jika tindakan kemudian dimulakan untuk sekat-tebusan atau mendapat kembali milikan, dihalang atas alasan bahawa adalah menjadi suatu penyalahgunaan proses mahkamah untuk membahagikan remedi di mana terdapat remedi yang penuh di dalam tindakan pertama.

(2) Aturan 83 Kaedah itu tidak relevan kepada suatu gadaian sah, berbanding dengan gadaian ekuiti, kerana gadaian sah, iaitu gadaian yang dijadikan oleh memorandum gadaian yang telah didaftarkan dengan betul, dikawal oleh peruntukan di bawah Land Ordinance of Sabah dan aturan-aturan yang dibuat di bawahnya.]

Notes

For a case on a deed of assignment, see 1 *Mallal's Digest* (4th Ed) para 899.

For cases on guarantees, see 1 *Mallal's Digest* (4th Ed) paras 915–917.

For cases on setting aside default judgments, see 2 *Mallal's Digest* (4th Ed) paras 799, 1287 and 1293–1331.

Cases referred to

1 *Anlaby & Ors v Praetorius* (1888) 20 QBD 764 (folld)

2 *United Malayan Banking Corp Bhd v Mideast Development Sdn Bhd & Ors* [1991] 1 MLJ 55 (folld)

3 *Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165 (folld)

4 *Asean Security Paper Mills Sdn Bhd v Provincial Insurance (Malaysia) Sdn Bhd* [1990] 2 CLJ 971 (folld)

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5 *Ban Huat Seng Co Ltd v Lee Poh Soo* [1967] 1 MLJ 145 (folld)
6 *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175 (folld)
7 *Perwira Habib Bank Malaysia Bhd v Wastecol Manufacturing Sdn Bhd & Ors* [1988] 3 MLJ 215 (folld)
B
8 *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135 (refd)
9 *Public Finance Bhd v Soo Hock Siong* [1988] 3 MLJ 352 (folld)
10 *Co-operative Central Bank Bhd v Belaka Suria Sdn Bhd* [1991] 3 MLJ 43 (refd)
11 *Gordon Grant & Co Ltd v FL Boos* [1926] AC 781 (refd)
C
12 *The Hongkong and Shanghai Banking Corp Ltd v Kaline Holdings Sdn Bhd & Ors* [1992] 2 CLJ 1286 (refd)
13 *Williams v Hunt* [1905] 1 KB 512 (refd)

Legislation referred to
Sabah Land Ordinance s 41(2)

D

Lucy Lo (*Hiew & Chin*) for the plaintiffs/respondents.
Hiew Vui Chung (*MF Poon, Hiew and Associates*) for the defendants/applicants.

E *Cur Adv Vult*

Ian HC Chin JC:

I *History of the matter*

F This is an application, taken out on 10 April 1993, by Syarikat Jaya Perkakas (Sabah) Sdn Bhd ('the first defendant'), Hong Kim Sime ('the second defendant'), Goh Bun Kwee ('the third defendant') and Yee Pak Kui ('the fifth defendant') to set aside a judgment in default of appearance entered against them and one other defendant on 17 March 1988. The claim by the plaintiffs, which was endorsed in the writ issued on 25 November G 1986, against the first defendant was that 'between the period from 17 May 1985 to 4 December 1985 the plaintiffs had granted a loan of RM230,000 to the first defendant' which the first defendant, despite repeated requests and demands, had failed to repay. The second, third and fifth defendants were sued on a guarantee dated 6 March 1985. The writ was H served on the first and fifth defendants on 12 December 1986, on the second defendant on 17 December 1986 and on the third defendant on 15 December 1986. No appearance was entered, hence the said judgment in default of appearance.

II *Grounds of application*

I Hiew Vui Chung Esq, learned counsel for the defendants, argued that, in so far as the first defendant was concerned, the judgment was irregular because leave under O 83 r 4 of the Rules of the High Court 1980 ('the RHC') was not obtained and the action was a charge action. As for all the

defendants learned counsel argued that: (i) there was no proper demand for payment; and (ii) there was a breach of the loan agreement, in that the plaintiff had released the loan before the down payment for the property was made by the first defendant and this discharged their liability under the guarantee. Those are the grounds advanced for setting aside the judgment. But the affidavit filed on behalf of the first defendant advanced one other reason why the judgment ought to be set aside, which learned counsel did not refer to, and this is that the 'minutes of the meeting and resolution were not valid as one of the persons certifying the same was not the authorized person to certify such'. I will assume that this ground had been abandoned. In any event, it is evidently of no merit because, if there was a meeting authorizing the loan, it matters not who certified the minutes.

III *Decisions*

A Delay

More than five years had elapsed before the present application to set aside the judgment was made. What is the law regarding this aspect of the matter? A distinction is made between a regular and an irregular judgment. It appears that in the case of an irregular judgment, a defendant is entitled ex debito justitiae to have it set aside (see *Anlaby & Ors v Praetorius*[1]) and therefore, it matters not whether there was delay but the defendant must still show he has a defence on the merits before the judgment can be set aside. See *United Malayan Banking Corp Bhd v Mideast Development Sdn Bhd & Ors*[2] at p 57, per Abu Mansor J. In the case of a regular judgment, it seems that though unexplained delay is a relevant consideration, the predominant consideration is still whether there is a defence on the merits. See *Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors*,[3] per Zakaria Yatim J at p 169; and *Asean Security Paper Mills Sdn Bhd v Provincial Insurance (Malaysia) Sdn Bhd*,[4] per Anuar J. But, unexplained delay may justify the court's conclusion that the application to set aside the judgment is not made bona fide. See *Ban Huat Seng Co Ltd v Lee Poh Soo*,[5] per Ismail Khan J (as he then was) at p 147; *Malaysia Building Society Bhd v Lim Kheng Kim & Ors*,[6] per Edgar Joseph Jr J (as he then was); and *Perwira Habib Bank Malaysia Bhd v Wastecol Manufacturing Sdn Bhd & Ors*,[7] per Siti Norma Yaakob J.

Having set out the principles, I will now turn to the facts. In this regard, the second defendant, on his own behalf and on behalf of the first defendant, made the following averments in his affidavit, viz:

(25) The plaintiffs' insistence that the loan shall be settled culminated in the plaintiffs taking court action against the first defendant and the guarantors, including me.

(26) At the material time, I was still negotiating with the plaintiffs' branch manager and telling him of the defendants' predicament. I was then ignorant of the steps that I or the first defendant must do in order to defend the action as I was hopeful that the matter could be settled with the goodwill of the plaintiffs.

That was all that was said by the second defendant, for himself and on behalf of the first defendant, by way of explanation, if that can be called one, of the delay of more than five years in making this application and of how the default judgment came to be entered. As for the third and fifth defendants, there was absolute silence in their respective affidavits as to why they allowed judgment to be entered and as to why they took more than five years after the judgment was entered against them to apply to set aside the same. Counsel for the defendants had conceded that there was no explanation as to why judgment was allowed to be entered and as to why it took more than five years for all the said defendants to apply to set aside the judgment. I must add that, even without that concession, I would still find that no explanation was offered for the delay. Since, according to the authorities that I have referred and which I respectfully follow, the court has still to consider whether there is merit in the proposed defence, I will now proceed to consider whether any triable or arguable issues, the essence of a defence on the merits, have been raised.

B Defence on the merits

As for the first defendant it was, to recap, argued that the plaintiffs' action was a charge action within the meaning of O 83 of the RHC 1980 and the judgment was irregular because leave under O 83 r 4 of the RHC 1980 was not obtained. The statement of claim of the plaintiffs against the first defendant shows the cause of action to be for money lent. It did not claim for possession or sale of the property. But counsel for the defendants argued that, apart from the existence of a loan agreement, there was also a deed of assignment which, when read together with the loan agreement, operates as an equitable charge and, therefore, comes within the purview of O 83 of the RHC 1980 which requires leave for judgment to be entered, which was absent in the present case. The court was referred to the case of *Malayan Banking Bhd v Zahari bin Ahmad*,[8] a decision of Mohamed Dzaiddin J (as he then was). Since the first line of the judgment of that case explains all, I will reproduce it, viz:

> In this application the plaintiff has applied to this court for an order that they be at liberty to issue a writ of possession in respect of one unit of flat at Bandar Bayan Baru, Pulau Pinang and be at liberty to sell the said flat by public auction or by private treaty.

The learned judge in that case, held that the loan agreement and the deed of assignment created an equitable charge to which an application for the reliefs spelt out in O 83 can be made. The case did not decide that where an equitable charge was created and though a claim was only for the recovery of the money lent, the action must necessarily come under O 83. I referred learned counsel to the case of *Public Finance Bhd v Soo Hock Siong*[9] but he was not able to say why I should not follow the case. It is always possible that a factual situation may give rise to several causes of action and it is a party's right to elect which cause of action he wishes to

pursue. There cannot be any valid ground for complaint if he prefers one to the other. In *Co-operative Central Bank Bhd v Belaka Suria Sdn Bhd*,[10] Lim Beng Choon J, after citing with approval *Fisher & Lightwood's Law of Mortgage* (9th Ed, 1977) at pp 270–271 and *Gordon Grant & Co Ltd v FL Boos*,[11] said, at p 47:

> In principle therefore a chargee has a right to institute an action for recovery of the debt and also a right to assert the power of sale on the incumbered property; the two actions are not the same.

That case was followed by the case of *The Hongkong and Shanghai Banking Corp Ltd v Kaline Holdings Sdn Bhd & Ors*.[12] In cases of this nature, where the plaintiff could, in one proceedings, obtain the relief of foreclosure or possession and the recovery of the money, and yet chose only to sue for the recovery of the money and not both, the plaintiff may, if subsequent action is commenced for foreclosure or possession, be barred on the ground that it is an abuse of the process of the court to divide the remedy where there is a complete remedy in the first action. See *Williams v Hunt*[13] which was referred to in the *Hongkong and Shanghai Banking Corp Ltd v Kaline Holdings Sdn Bhd & Ors* case.[12] In the present case, the plaintiffs could have combined their claim for the recovery of the loan with a claim for the possession of the property which would have come under O 83 of the RHC, but the plaintiffs did not and chose only to sue for the recovery of the money. It was a simple claim for money lent as in *Public Finance Bhd v Soo Hock Siong*'s case,[9] for which no leave was required for judgment to be entered. It has to very rare nowadays to see a party resorting to O 83 of the RHC since, almost invariably, the necessary contracts or deeds would have empowered the lender to sell the property by public auction or by private treaty and this sentiment was made years ago by *Mallal's Supreme Court Practice* (2nd Ed) at p 1153, viz:

> A foreclosure action is not available under the NLC. The chargee can apply to court for sale of the charged lands under the NLC. But even in England, foreclosure actions are now comparatively rare in practice, as the mortgagee's remedy by sale, under the power of sale conferred on him by the mortgage deed or by the Law of Property Act 1925, s 101, is in general more speedy and convenient.

Moreover, O 83 has no relevance to a legal, as distinct from an equitable, charge because legal charges, that is, charges constituted by properly registered memoranda of charge are governed by the provisions of the Land Ordinance of Sabah and the rules made thereunder. All proceedings, including 'foreclosures', are decided by the assistant collector of land revenue of the district in which the property is situated. The assistant collector of land revenue conducts an enquiry to determine whether there is default in payment and whether a sale by public auction ought to be made. He set the price and other conditions of sale. An appeal against the decision of the assistant collector of land revenue lies to the director of lands and surveys and, from his decision and subject to certain conditions, to the High Court. In fact, s 41 of the Land Ordinance of Sabah bars the jurisdiction of the court. The said section reads:

A 41(2) Except as herein expressly provided, no court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by this Ordinance to a Collector or the Director.

('Collector' includes the assistant collector of land revenue and 'Director' means the director of lands and surveys.)

B As for the second , third and fifth defendants, O 83 of the RHC 1980 has no relevance since the claim against them is upon a guarantee they had executed. But they claim that: (i) there was no proper demand for payment because the judgment speaks of a larger sum than the letter of demand; and (ii) they were discharged from the guarantee because it was a condition that the first defendant must have paid the down payment for the property C before the plaintiffs shall have released the loan but the plaintiffs released the loan before any down payment was made. The second, third and fifth defendants did not, in their respective affidavits, aver that they had not received the notice of demand but they only referred to a letter of demand addressed to the first defendant (exh HKS16) which sum demanded, they D complained, was not the sum for which judgment was entered. Counsel for the defendants only argued that the notice of demand was not a proper demand because the judgment sum was less than the sum demanded. Judgment for a sum less than that demanded was because of partial payments made after the letter of demand. The defendants' case is not that the partial E payments had affected the notice of demand but that the judgment was less than that demanded; I, therefore, will not concern myself with the legal consequences of accepting partial payments after the notice of demand. I asked learned counsel for the defendants for an authority but he is not able to cite any to say that a judgment entered for a sum less than that demanded by letter rendered the demand invalid. There is, therefore, no merit in this F proposed defence. The other proposed defence was that there was a breach of the loan agreement, in that the plaintiff had released the loan before the down payment for the property was made by the first defendant, and this discharged their liability under the guarantee. The actual words used in the relevant affidavit are:

G (16) It was a term and condition of the letter of offer and the loan agreement (exh HKS3) that the loan granted by the plaintiffs was to be released progressively, after the first defendant had paid its portion of the purchase price, that is to say, the difference between the purchase price and the said loan.

H The argument centres, apart from cl 1 of the loan agreement, around a letter of the plaintiff to the first defendant dated 7 August 1984 (exh HKS9) which sets out the terms and conditions of a loan of RM230,000 to the first defendant; one of which was that the second to the fifth defendants shall jointly execute a guarantee. The other part of the letter reads:

I Disbursement upon completion of the following:

...

(10)Loan is to be released progressively on the basis of the value as certified by an architect/engineer acceptable to MBB and in accordance with the schedule

> of payment contained in the sales and purchase agreement after you have paid your portion of the purchase price; ... A

Clause 1 of the relevant loan agreement dated 6 March 1985 (exh HKS3) reads:

> In consideration of the loan of RM230,000 only (hereinafter called 'the loan' and which expression shall, where the context so permits, include any part or balance thereof) to be paid or advanced for the benefit of the borrower by the lender to the developers by progressive released on the basis of the value as certified by an architect/engineer acceptable to the lender and in accordance with the schedule of payments contained in the sale agreement after the borrower has/have paid his/their portion of the purchase price (the payment whereof the borrower hereby expressly authorizes the lender to make) the borrower hereby agrees covenants and undertakes as follows: B C
>
> ...

The sale and purchase agreement was entered into between a developer and the first defendant on 1 August 1983 for a sum of RM339,910. The first defendant had to fork out RM109,910, aside from the loan of RM230,000, to complete the purchase. By 31 January 1985, the first defendant had paid the developer RM84,977.50, which payments were made on diverse dates, including 17 June 1987, 31 March 1983 and 2 May 1984 (see exh HKS14), leaving a balance of RM32,400.96 (see exh HKS11). The plaintiff had, by 17 May 1985, released a sum of RM162,018 though the first defendant had not fully settled the down payment for the property (see exh HKS14). The balance of the loan was, subsequently, on unknown dates, released but to date, the balance of the down payment had not been paid by the first defendant. When pressed for payment by the letter of 6 January 1986 (exh HKS16), the first defendant did not complain that the loan was released before the first defendant had completed the down payment, and, instead, the first defendant responded by making part repayment of the loan. The matter of the down payment was raised for the first time in the said affidavit of 7 April 1993. D E F

Could the first defendant then set up its own failure to fully pay the down payment for the property as a defence to the plaintiffs' claim for the money lent to the first defendant? I am of the opinion that the first defendant cannot. The evidence shows that the first defendant desperately needed the loan and, despite previous rejection by the plaintiffs, the first defendant persisted and finally obtained the loan from the plaintiffs. There is no allegation that the plaintiffs had, in contravention of any instruction of the first defendant, released the loan to the detriment of the first defendant. It is said in 1 *Chitty on Contract* (26th Ed) at para 1721 that: G H

> It has also been said to be a general principle of law that, where performance of a condition precedent is prevented by the act or default of one party, the contract is taken to have been duly performed by the other even though the condition has not been satisfied. Thus, in *Mackay v Dick* (1881) 6 App Cas 251 where a contract of sale of goods was subject to a condition precedent to be performed by the buyer, but which he neglected to perform, the seller was held entitled to sue for the price. I

Therefore, there is also no merit in this proposed defence of the first defendant.

As for the second, third and fifth defendants, one of the proposed defences is that 'there had not been a proper demand for the repayment of the loan from the plaintiffs'. It is best that I reproduce the relevant part of the affidavit of the second defendant, viz:

> 27 Finally, I am advised that there had not been a proper demand for the repayment of the loan from the plaintiffs. I crave to refer to the judgment whereby it is shown that the judgment sum is RM265,887.41. However, I have in my possession, a letter of demand dated 6 January 1986, sent by Messrs Hiew & Chin, acting for the plaintiffs, to demand for the payment of RM272,506.92. A copy of the said letter is now produced before me and annexed hereto marked exh HKS16.
>
> 28 Accordingly, I verily believe that demands for the payment of the loan had not been properly made against the first defendant as well as the guarantors, so as to entitle the plaintiffs to claim for the balance of the whole loan outstanding.

The third and fifth defendants swore identical affidavits to say that they 'rely on' the said affidavit of the second defendant to support their application to set aside the judgment and that the 'facts deposed in the second defendant's affidavit are within (their) personal knowledge or from the records of the first defendant to which (they) have access'. The complaint is only that there is a discrepancy between the amount demanded and the amount in which judgment is entered, which I have already earlier found to be a non-issue. Nowhere in the affidavits of the second, third and fifth defendants is there any allegation that the guarantee provides for a demand for payment as a pre-condition for action. There is also no allegation that the plaintiffs had failed to demand for payment. In fact, no guarantee was produced by the defendants. There is also no substance in this proposed defence. As for the alleged breach by the plaintiffs in releasing the loan before full payment of the down payment, there is here also no allegation that it was a condition of the guarantee that the plaintiffs would not release the loan until the down payment had been fully paid, and, as earlier stated, no guarantee was produced to show the alleged condition, if there was such a condition.

There was no explanation at all why the defendants took more than five years to apply to set aside the judgment. This factor coupled with the manner, which I have referred to, in which the affidavits had been deposed by the defendants cast doubt on the bona fides of the application of the defendants. I therefore dismiss the defendants' application with costs.

Application dismissed.

Reported by Yap Foo Ken